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3 **US DISTRICT COURT FOR THE**
4 **MIDDLE DISTRICT OF NEW HAMPSHIRE**
5

6 **Howard R. Fogle, Jr., and Sharon Fogle,**

7 **Plaintiffs,**

8 **vs.**

9
10 **Wilmington Finance, a division of AIG**
11 **Federal Savings Bank, CountryWide Home**
12 **Loans, and Saratoga First Guarantee**
13 **Funding,**
14 **Defendants.**

§ Case No.

§

§ COMPLAINT FOR

§ INJUNCTIVE RELIEF,

§

§ VIOLATIONS OF TRUTH-IN-
§ LENDING ACT, VIOLATIONS OF
§ REAL ESTATE SETTLEMENT
§ PROCEDURES ACT, NEW HAMPSHIRE
§ UNFAIR DECEPTIVE OR
§ UNREASONABLE COLLECTION
§ PRACTICES ACT, RSA 358C, NEW
§ HAMPSHIRE FORECLOSURE
§ STATUTE, RSA 4479, BREACH OF
§ CONTRACT, BREACH OF FIDUCIARY
§ DUTY, UNJUST ENRICHMENT, FOR
§ WRONGFUL FORECLOSURE, AND
§ FRAUD
§

16
17 **TO THE HONORABLE UNITED STATES DISTRICT JUDGE:**

18 Plaintiffs, Howard and Sharon Fogle Jr., by and through the undersigned counsel, hereby bring
19 this action against Wilmington Finance, a division of AIG Federal Savings Bank (hereinafter
20 "Wilmington"), Saratoga First Guarantee Funding (hereinafter "Saratoga"), CountryWide Home
21 Loans (hereinafter "CountryWide"), and John and Jane Doe (collectively, the "Defendants"), for
22 serious breaches of their fiduciary duties, for wrongful foreclosure, for violations of the Real Estate
23 Settlement Procedures Act ("RESPA"), for violations of the Truth-in-Lending Act ("TILA"), for
24 violations of the New Hampshire foreclosure statute, RSA 479, for violations of the New
25 Hampshire Unfair, Deceptive or Unreasonable Collection Practices Act, RSA 358C, for Fraud,
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1 to have a trustee's sale (foreclosure) enjoined; to have such trustee=s sale (foreclosure) set aside
2 if and when the same shall occur with or without injunction and/or to obtain damages for wrongful
3 foreclosure; to obtain injunctive relief from enforcement of any and all foreclosure related remedies,
4 including Defendant's attempts to take possession of the Plaintiffs' property through unlawful
5 detainer procedures under New Hampshire law; and to obtain declaratory relief. Exhibit A attached
6 thereto is fully incorporated herein as if copied and set forth at length.

7
8 **I**

9 **JURISDICTION/VENUE**

10 1. This Court has jurisdiction of the state claims pursuant the doctrine of pendent
11 jurisdiction of the New Hampshire Unfair Deceptive or Unreasonable Collection Practices Act,
12 RSA 358C, and wrongful foreclosure claims under the New Hampshire Foreclosure Statute,
13 RSA 479, pursuant to 28 U.S.C. §1367.

14 2. This Court has jurisdiction of the TILA and RESPA claims under 15 U.S.C.
15 §1640(e) and 12 U.S.C. §2614.

16 3. Venue is proper in this district because the real property which is the subject of
17 this suit is in this district, Plaintiffs reside and are domiciled in this district, and the Plaintiffs do
18 business in this district.
19

20 **II**

21 **THE PARTIES**

22 4. Plaintiffs are citizens of the State of New Hampshire, and are "consumers" as
23 defined by 15 U.S.C. §1692a (3).
24

25 5. Defendants Wilmington, CountryWide, and Saratoga are engaged in lending
26 and/or servicing as to federally related mortgage loan transactions, such as the one at issue in this
27

1 suit.

2 6. The principal purpose of the business of Defendants Wilmington, and Saratoga is
3 the extension of consumer credit. Defendant

4 7. CountryWide is in the business of collecting consumer debts in this jurisdiction.

5 8. A principal purpose of the business of Defendant CountryWide is the collection
6 of consumer debts using the mails and telephone, and it regularly attempts to collect consumer
7 debts for others.

8 9. Defendant CountryWide is a "debt collector" as defined by 15 U.S.C. §1692a(6)
9 New Hampshire Unfair Deceptive or Unreasonable Collection Practices Act, RSA 358C.

10 10. Upon information and belief, Defendant Wilmington, is a Delaware corporation
11 having principal offices at 401 Plymouth Road, Ste 400, Plymouth Meeting, PA 19462, and
12 doing business in New Hampshire. Wilmington may be served with process by serving its
13 president, managing member, or other officer in charge at the foregoing address.

14 11. CountryWide is California corporation, having its principal offices at P.O. Box
15 10229, Van Nuys, CA 91410-10229, and doing business in New Hampshire. It may be served
16 with process by serving its President, managing member, or other officer in charge at the
17 foregoing address.

18 12. Saratoga is a New York corporation, having its principal offices at 21 Congress
19 Street, Saratoga Springs, NY 12806, and doing business in New Hampshire. It may be served
20 with process by serving its President, managing member, or other officer in charge at the
21 foregoing address.

22 13. Plaintiffs also bring this action against any person relevant to the acts and claims
23 alleged therein, but who may be identified during discovery in this case.
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III

DEMAND FOR JURY TRIAL

14. Plaintiffs DEMAND A JURY TRIAL pursuant to Rule 38 (b), and hereby state as follows:

IV

DEFINITIONS

As used in this Complaint:

15. The terms "amount financed," "annual percentage rate," "closed-end credit," "consumer," "consumer credit," "consummation," "credit," "creditor," "dwelling," "finance charge," "mortgage," "open-end credit," "payment schedule," "points and fees," "residential mortgage transaction," "reverse mortgage transaction," "security interest," and "total of payments" are defined as set forth in sections 103 and 128 of TILA, 15 U.S.C. §1602 and §1638, and Sections 226.2, 26.4, 226.18, 226.22, 226.32, and 226.33 of Regulation Z, 12 C.F.R. §§ 226.2, 26.4, 226.18, 226.22, 226.32, and 226.33

16. The term "Regulation Z" means the regulation the FRB promulgated to implement and HOEPA, 12 C.F.R. §226, as amended. The term also includes the FRB Official Staff Commentary on Regulation Z, 12 C.F.R. §226, supp.1, as amended.

17. The term "TILA" means the Truth in Lending Act, 15 U.S.C. §§ 1601-1666j, as amended. TILA, which took effect on July 1, 1969, is intended to promote the informed use of consumer credit by requiring creditors to disclose credit terms and costs, requiring additional disclosures for loans secured by consumers' homes, and permitting consumers to rescind certain transactions that involve their principal dwellings.

V

DEFENDANT'S BUSINESS

1
2 18. At all times relevant to this Complaint, Defendants have maintained a substantial
3 course of trade in or affecting commerce, as the term "commerce" is defined in Section 4 of the
4 FTC Act, 15 U.S.C. § 44.
5

6
7 **VI**
8 **BACKGROUND**

9 19. The federally related mortgage loan transactions at the root of this case
10 (sometimes hereinafter the AFogle Loan®) were closed on or about November 28, 2005
11 ("Closing"), whereupon Plaintiffs executed an adjustable rate Note to Defendant Wilmington in
12 the original principal amount of \$294,750 (ANote®), and a mortgage securing such Note,
13 covering real property, which was then and now remains the permanent residence of the
14 Plaintiffs. Reference is made to such instruments, including the mortgage of record in the
15 Official Records of the County of Merrimack, to show the full description of such real property,
16 known locally as 21 Old Gilmanton Rd., Canterbury, NH 03224, Merrimack County,
17 ("Property").
18

19 20. Defendant Countrywide, as Servicer for Wilmington, has started the foreclosure
20 process on Plaintiffs' property by sending them an acceleration letter.
21

22 **COUNT I (TILA)**

23
24 21. Defendants Wilmington and Saratoga failed to provide that the Note contained a
25 variable rate feature, in violation of 12 C.F.R. §226.18(f)(i). Defendants Wilmington and
26 Saratoga failed to provide that the box referencing this feature was checked, notwithstanding
27 the TIL Disclosure Statement is defective altogether.

1 22. Although there was a statement on the TIL indicating that variable rate
2 disclosures were provided earlier, the Defendants Wilmington and Saratoga failed to check the
3 required box indicating as such, in violation of 12 C.F.R. § 226.18(f)(iii).

4 23. Defendants Wilmington and Saratoga failed to provide that, either at the time of
5 application or before Plaintiffs paid a nonrefundable fee, or if the application was received over
6 the telephone, that the **Good Faith Estimate** was mailed to Plaintiffs within three business days
7 following receipt of the application.
8

9 24. Although Defendants Saratoga and Wilmington provide a document at closing
10 entitled, "LETTER OF EXPLANATION", in an effort to comply with TILA, RESPA and
11 Federal Home Loan requirements, as the letter states, the information fails to provide required
12 information such as would be found in the Consumer Handbook on Adjustable Rate Mortgages.
13 No such Handbook was present among the loan documents, thereby violating §226.19 (b) (1).
14

15 25. Since the TIL was not provided at all over the history of the loan, except upon
16 Plaintiffs' inquiry and/or when Defendants offered a refund to Plaintiffs if they would sign a
17 release form and sign documents that were not provided at closing or at any time previously,
18 Wilmington and Saratoga failed to provide a brief description of the APR, thereby violating 12
19 C.F.R. §226.18(e).
20

21 26. Defendant Wilmington failed to disclose any security interest taken, thereby
22 violating, 15 U.S.C. 1638(a)(9): Reg. Z, 12 C.F.R. § 226.18(m). Such disclosure is typically
23 found on the TIL Statement Disclosure.

24 27. Defendants Wilmington and Saratoga failed to provide that disclosures were
25 furnished before consummation. Defendants Wilmington and Saratoga failed to provide that
26
27

1 preliminary disclosures were given to borrowers, as required by 12 C.F.R. §226.17(b) and
2 226.19(b).

3 28. Plaintiffs' loan was a variable rate loan, yet the payment schedule shows 359
4 level payments of \$1,787.18, and 1 irregular payment of \$1,788.74. Therefore, the Defendants
5 Wilmington and Saratoga failed to provide a payment schedule reflecting all components of the
6 finance charge to repay loan principal, interest on the loan, and any other finance charge payable
7 by the Plaintiffs after consummation of the transaction properly reflecting the terms of the
8 NOTE, thereby violating Reg. Z, Section 226.18(g).

10 29. Due to the fact that the TIL is defective, information required to be provided on
11 the TIL has been asserted here as separate violations. Defendants Wilmington and Saratoga
12 failed to provide a description of the total of payments, thereby violating 12 C.F.R. § 226.18(h).

13 30. There is nothing indicated on the TIL regarding late payments. Defendants
14 Wilmington and Saratoga failed to provide whether a late payment charge is applicable, thereby
15 violating 12 C.F.R. § 226.18 (l).

17 31. No TIL disclosure was provided altogether. Therefore, the Defendants
18 Wilmington and Saratoga failed to provide a statement referring to the contract document for
19 specified information, in violation of 12 C.F.R. §226.18(p).

20 32. Defendants Wilmington and Saratoga failed to provide an appropriate assumption
21 disclosure for residential mortgage transactions, thereby violating 12 C.F.R. §226.18(q).

22 33. Defendants Wilmington and Saratoga failed to provide a preliminary or any
23 separate disclosure that the note contains a variable rate feature pursuant 12 C.F.R. §226.18(f)
24 (2) (i). On the Note itself, there is a statement that the Note contains provisions allowing for
25

1 changes in the interest rate, monthly payment, and principal balance. This, however, does not
2 constitute a disclosure.

3 34. The Amount Financed was overstated by \$1453.56. Overstatements of the amount
4 financed are arguably a non-violation according to the Office of the Comptroller of Currency.
5 However, the erroneous amount financed will trigger an error in the calculation of the APR.

6 35. Defendants Wilmington and Saratoga failed to provide an Itemization of Amount
7 Financed ("IOAF"), or disclosure informing Plaintiffs that they were entitled to that disclosure, in
8 writing, as required by 12 C.F.R. §226.18(c). The Good Faith Estimate was not timely or accurately
9 provided, and is therefore defective.
10

11 36. Certain important disclosures were missing altogether. Disclosures, therefore, do not
12 meet the requirements of 12 C.F.R. § 226.17(a)(1), which requires that disclosures be clear,
13 conspicuous, grouped, segregated, and in writing in a form the consumer can keep.
14

15 37. Defendants Wilmington and Saratoga failed to provide that disclosures as to the
16 circumstances that permit a rate increase were provided, in violation of 12 C.F.R. §226.18 (f) (i).

17 38. Due to the fact that no Variable Rate disclosures whatsoever were provided, the
18 Defendants Wilmington and Saratoga failed to provide disclosures regarding lifetime limits on
19 the rate increases, in violation of 12 C.F.R. §226.18(f) (1)(ii).
20

21 39. Defendants Wilmington and Saratoga failed to provide the effects of the increase
22 of the rate, in violation of 12 C.F.R. §226.18(f) (1) (iii).
23

24 40. Although Defendants Wilmington and Saratoga provided an example on their
25 LETTER OF EXPLANATION, it appears to have been provided as closing. No dates or
26 signatures appear on the subject letter. Defendants Wilmington and Saratoga failed to provide a
27

1 hypothetical example of new payment terms at the time required, in violation of 12 C.F.R.
2 §226.18(f)(1)(iv).

3 41. Defendants Wilmington and Saratoga failed to provide, relative to the variable
4 rate mortgage contract, the maximum possible interest rate, in violation of 12 C.F.R. §226.30(a).

5 42. Plaintiffs did not receive any Notices of the Right to Cancel. Defendants
6 Wilmington and Saratoga therefore violated 12 C.F.R. §226.23(b)/§226.15(b).

7 43. Due to the fact that the Defendants Wilmington and Saratoga failed to provide
8 any notices at all, all provisions of the Act regarding Rescission notice information are asserted
9 here as violations of 12 C.F.R. §226.23(b)(1)(i—5) and 12 C.F.R. §226.15(b)(2-5).

11 **COUNT II (RESPA)**
12

13 44. The Plaintiffs repeat, reallege, and incorporate by reference the foregoing
14 paragraphs.

15 45. There were charges missing or inaccurate on the HUD-1 Settlement Statement
16 (hereinafter “HUD-1”), in violation of 12 U.S.C. §2603 (a) and (b) and 24 C.F.R. S3508 (a) and
17 (b).

18 46. Plaintiffs were assessed a yield spread premium in the amount of \$4,142.40 (Line
19 815 of the HUD-1). Defendants violated the Real Estate Settlement Procedures Act (hereinafter
20 “RESPA”) in the deceptive disclosures regarding the yield spread premium. These unearned
21 fees received by Saratoga at closing were excessive, and may constitute an illegal kickback as
22 defined in 12 U.S.C. §2607, and in violation of 24 C.F.R. 3500.14.
23

24 47. Plaintiffs were also assessed a loan origination fee in of \$10,530.25. See line 801
25 of the HUD-1, and a processing fee of \$575 (Line 808 of the HUD-1). The multiple fees charged
26 by Saratoga possibly violated 12 U.S.C. §2607. Total broker’s fees were \$15,247.75, and were
27

1 in excess of 5% of the loan amount.

2 48. Saratoga performed no services for the yield spread premium of \$4,142.50, and
3 the excessive origination fees of \$10,530.25 charged at closing.

4
5 49. Any person who, pursuant to any agreement or understanding, gives or receives a
6 fee or a thing of value (including payments, commissions, fees, gifts, or special privileges) for
7 the referral of settlement business violates RESPA (section 8). Payments in excess of the
8 reasonable value of goods provided or services rendered are considered kickbacks. Appendix B
9 and OCC bulletin 96-8 (section 8 transactions) provide guidance on the meaning and coverage
10 of the prohibition against kickbacks and unearned fees. In connection with the Fogle Loan,
11 RESPA 24 C.F.R. 3500.14 was violated when Saratoga, received \$10,530.25 in loan origination
12 fees (Line 801, HUD-1), plus a processing fee of \$575 (Line 808 HUD-1), and a yield spread
13 premium of \$4,142.50 (Line 815 HUD-1).

14
15 50. Defendants Wilmington and Saratoga failed to provide that the Good Faith
16 Estimate (AGFE®) was delivered or mailed to Plaintiffs within three business days of the time
17 Plaintiffs received Defendants' application (24 C.F.R. 3500.7(a)). There were two separate
18 GFEs, dated the same date, but containing different information. Until discovery of the actual
19 receipts from service providers, it cannot be determined if the HUD 1 Settlement Statement
20 properly reflects the closing costs.

21
22 51. Since the Lender did not provide the GFE, then the lender failed to provide:

- 23 a. The lender's name;
24
25 b. The estimate of charges listed in the HUD-1 (24 C.F.R. 3500.7(c))
26 (1);
27

c. The estimate of all other charges customary to the locality (24 C.F.R. 500.7 (c)(2);

d. Any GFE later provided is defective, since it was not provided pursuant to the timing requirements of the regulations. The GFE was provided on the day of Closing, November 28, 2005.

52. Defendants failed to obtain a written acknowledgment of the servicing disclosure from Plaintiffs per 24 C.F.R. 3500.21(c).

53. Defendants Wilmington and Saratoga failed to provide that a Good Faith Estimate was given before or at consummation, thereby violating 12 U.S.C. §2604 (d). Two separate GFEs were provided, each with different information, but dated the same date, neither of which appears to have been given according to the timing requirements, at application, or within three days of receipt of application. Additionally, the application is not signed or dated.

54. Wilmington and Saratoga failed to provide that material disclosures, as defined in 12 C.F.R. §226.23(a)(3) to mean the required disclosures of the APR, the finance charge, the amount financed, the total loan payments, payment schedule and the disclosures and limitations referred to in 12 C.F.R. §226.32(c) and (d), were given the borrower.

55. At no time during the history of the loan transaction were Plaintiffs made aware that Wilmington paid directly to Saratoga, without the knowledge of Plaintiffs/ Borrowers, out of its own pocket a Yield Spread Premium of \$4,142.50, which in turn deceptively up-sold the interest rate, a fact concealed from Plaintiffs.

56. By the foregoing acts, Defendants Wilmington and Saratoga concealed the true cost of credit to Plaintiffs, defeating the purpose of TILA, and damaging Plaintiffs. Plaintiffs, had they been appropriately informed, could have sought other sources of credit or negotiated different terms, but were unable to do so by virtue of Wilmington and Saratoga's conduct, for

1 which conduct such Defendants are now responsible.

2 **COUNT III (Right of Rescission)**

3 57. The Plaintiffs repeat, reallege, and incorporate by reference the foregoing
4 paragraphs.

5 58. No Notices of the Right to Cancel were provided. Defendants Wilmington and
6 Saratoga therefore violated 226.23(b)/226.15(b).

7 59. Due to the fact that Plaintiffs were not provided any notices at all, all provisions
8 of the Act regarding Rescission notice information is asserted here as violations of
9 226.23(b)(1)(i—5) and 226.15(b)(2-5).

10 60. Plaintiffs have an extended right to rescind until November 28, 2008, and have
11 exercised this right by sending letters of rescission to Wilmington, Saratoga, and CountryWide.

12 **COUNT IV (Breach of Contract)**

13 61. The Plaintiffs repeat, reallege, and incorporate by reference the foregoing
14 paragraphs.

15 62. Plaintiffs have allegedly been damaged under a Quasi Contract by 1) paying interest
16 for the YSP to which Wilmington is not entitled, 2) paying a Broker's fee over time by way of the
17 interest to Wilmington, and 3) Saratoga receiving \$4,142.50 and \$10,530.50 + \$575.00 for
18 compensation that otherwise was not in a contract, as possibly required by New Hampshire law.

19 In so doing, the Defendants Wilmington and Saratoga, breached their contractual duties to
20 Plaintiffs, and did not act in accord with their duty of good faith and fair dealing toward
21 Plaintiffs.

22 **COUNT V (FDCPA)**

1 63. The Plaintiffs repeat, reallege, and incorporates by reference the foregoing
2 paragraphs. Defendant CountryWide's violations of the FDCPA include, but are not limited to
3 the following.

4 64. The Defendant CountryWide attempted to collect a consumer debt ("Debt")
5 allegedly owed by Plaintiffs. The obligation required Plaintiffs to pay money arising out of
6 transactions in which money, property, insurance, or services were the subject thereof and the
7 same were primarily for personal, family, or household purposes.

8
9 65. The foregoing acts and omissions were undertaken on behalf of CountryWide by
10 their respective officers, agents, or employees acting at all times relevant hereto within the scope
11 of that relationship. The foregoing acts and omissions of CountryWide were undertaken
12 willfully, intentionally, knowingly, and/or in gross disregard of the rights of the Plaintiffs. The
13 foregoing acts and omissions of the servicer Defendant CountryWide were undertaken
14 indiscriminately and persistently, as part of CountryWide's regular and routine collection
15 efforts, and without regard to or consideration of the identity or rights of the Plaintiffs.
16

17 66. In violation of 15 U.S.C. §1692d, CountryWide engaged in conduct, the natural
18 consequence of which was to harass, oppress, or abuse a person in connection with the collection
19 of a debt, which conduct included failing to exercise reasonable care in ascertaining the facts
20 prior to making a demand for payment.

21
22 67. In violation of 15 U.S.C. §1692e(5) and the "least sophisticated consumer
23 standard," Defendant CountryWide threatened to take an action which could not legally be taken,
24 or that is not intended to be taken, to-wit, the threat of foreclosure.

25 68. In violation of 15 U.S.C. §1692f, Defendant CountryWide used unfair or
26 unconscionable means to collect or attempt to collect a consumer debt, which means included
27

1 failing to exercise reasonable care in ascertaining the facts prior to making a demand for
2 payment.

3 69. In violation of 15 U.S.C. §1692g(b) Defendant CountryWide attempted to collect
4 a debt without first obtaining verification of the debt, and of the name and address of the original
5 creditor.

6
7 **COUNT VI (RSA 358C)**

8
9 70. The Plaintiffs repeat, reallege, and incorporate by reference the foregoing
10 paragraphs.

11 71. The Defendants' violations of the New Hampshire Unfair Deceptive or
12 Unreasonable Collection Practices Act, RSA 358C, include misrepresenting the quality,
13 characteristics, benefits and rights of the services involved in the transaction known as the Fogle
14 Loan.

15 72. In violation of RSA 358C, Defendant CountryWide threatened to take an action
16 prohibited by law, in sending Plaintiffs an acceleration letter.

17 73. The violations of FDCPA are incorporated here and realleged, as several
18 violations of RSA 358 C.

19 74. But for the misrepresentations by Defendants of the services of each in the
20 consumer lending transaction with Plaintiffs, Plaintiffs would not have sustained their resulting
21 damages, and would not have entered into the Fogle Loan.

22 75. Defendants stand responsible for those misrepresentations and resultant damages
23 by virtue of their claim of owning and holding the note(s) and related lien(s).

24
25
26
27 **COUNT VII (Breach of Fiduciary Duty)**

77. Saratoga had a fiduciary duty to Plaintiffs, which duty comprehends within it the duty of good faith and fair dealing, to obtain a loan for them on the best possible terms, to fully explain each and every element and cost of the overall loan transaction, and generally, to act in Plaintiffs' best interest in consummation of the entire loan transaction. Saratoga breached its fiduciary duty to Plaintiffs by causing them to absorb costs which were not fully or appropriately disclosed, as set forth above, including the discount points. Such breaches of fiduciary duty resulted in damage to Plaintiffs, in increased costs for the Fogle Loan and in the potential loss of their home through foreclosure and eviction.

78. The Plaintiffs repeat, reallege, and incorporate by reference the foregoing paragraphs.

80. The loan origination fees, YSP and processing fees total over 5% of the loan amount, and are excessive.

81. No contract or preliminary disclosures under TILA were given to Plaintiffs for the excessive loan origination fees in the amount of \$10,530.25, the undisclosed YSP of \$4,142.50 or the processing fees of \$575.

1 82. Defendants and/or its agent have been unjustly enriched at the expense of
2 the Plaintiffs, and considering the circumstances, allowing the Defendants to maintain the
3 benefit would be contrary to the rules of equity.

4 83. Defendants and/or its agent had full knowledge or had a duty to know that the above
5 excessive fees would adversely affect the interest rate, from which Plaintiffs received no benefit.

6 84. Defendants cannot in good conscience keep the benefits from their agent's actions
7 of charging the above excessive fees without full disclosure of its ramifications to the Plain-
8 tiffs, and undisclosed by preliminary disclosures required by federal and state law.

9 85. Plaintiffs demand the following restitution from Defendants: Actual and Exem-
10 plary damages, costs and reasonable attorney's fee.
11

12
13
14 **COUNT IX (Wrongful Foreclosure)**

15 86. The Plaintiffs repeat, reallege, and incorporate by reference the foregoing
16 paragraphs.
17

18 87. For all of the foregoing reasons, the Defendants' proceeding to begin the
19 foreclosure process against Plaintiffs' property is wrongful, and the same should be enjoined,
20 and, if permitted to be conducted, thereafter set aside.
21

22 **COUNT X (FRAUD)**

23 88. Plaintiffs repeat, reallege and incorporate by reference the foregoing paragraphs.

24 89. Defendants engaged in fraud by misrepresenting the interest rate that would be
25 applied to Plaintiffs' mortgage loan. The Defendants gave Plaintiff a Truth in Lending
26 Disclosure Statement, as required by federal law, which indicated the interest rate on the
27 mortgage loan had an annual percentage rate ("APR") of 6.399%. The APR is the relevant

1 variable a consumer will use to compare loans with different terms and conditions. Each of the
2 different loans must define an APR, so that the consumer can determine if he can obtain an
3 equivalent mortgage at a lower interest rate.

4 90. In an effort to induce Plaintiffs to take the Defendants' mortgage, the Defendants
5 went on to represent, in the Truth and Lending Disclosure Statement, that the total amount of
6 interest paid over the entire term of the loan would be \$353,606.61. By the wording of this
7 statement of a fixed amount of interest, any reasonable person would be led to believe that the
8 total interest payable on this loan was fixed, as if Defendant were offering Plaintiffs a fixed rate
9 mortgage. However, the Defendants in fact offered Plaintiff an adjustable rate mortgage
10 ("ARM"). The initial term of the loan would start at an interest rate of 6.00%, but then increase
11 beginning July 2006 to 5.45% + the London Interbank Rate of Interest (LIBOR). Thus, if
12 LIBOR was 4% in July 2006, Plaintiffs would be required to pay 9.45% interest on the
13 remaining balance of the mortgage loan. The bank reserved the right to increase the interest rate
14 on Plaintiff's loan every six months thereafter until a ceiling interest rate of 12% was reached.
15
16

17 91. With the range of possible interest rates on this loan that could increase every six
18 months by an unspecified and indeterminate amount (as no one knows precisely what LIBOR
19 rate will prevail in future years), the Defendants could not predict how much total interest would
20 be paid on this ARM. Yet, rather than disclosing a range of different total interest payments that
21 might occur over the term of this loan, Defendants instead chose to lure plaintiffs with false
22 advertising of the total interest to be paid as a fixed amount defined with precision down to the
23 cent.
24
25

26 92. The Truth in Lending Act (TILA), 15 U.S.C.S. § 1601 et seq., is intended to
27 promote the informed use of consumer credit by assuring meaningful disclosure of credit terms.

1 See 15 U.S.C.S. § 1601(a). The APR is one of the most important required disclosures, because
2 it requires lenders to express uniformly the cost of a credit transaction (interest) as an annual
3 rate. Reflecting the importance of this disclosure, TILA provides that the annual percentage rate
4 shall be disclosed more conspicuously than other terms. 15 U.S.C.S. § 1632 (a). The Code of
5 Federal Regulation provides that any change from a fixed to a variable interest rate before
6 consummation of the loan affects the annual percentage rate, and the existence of the variable
7 rate and the potential cost of the loan and must be disclosed. 12 C.F.R. §§ 226.17-.20.
8

9 93. Even when a borrower cannot establish actual damages, lenders may be liable for
10 technical or minor violations of the Truth in Lending Act (TILA), 15 U.S.C.S. § 1601 et seq.,
11 because, for instance, a proven violation of disclosure requirements is presumed to frustrate
12 TILA's purpose of permitting consumers to compare various available credit terms. 15 U.S.C.
13 § 1601(a).
14

15 94. By the prominent wording of the total amount of interest that would be paid under
16 the Defendants' proposed mortgage loan, Plaintiffs were led to believe that their interest
17 payments under this loan were fixed at the amount disclosed by Defendants. The
18 Defendants' false statement of the APR and the total interest under the term of this
19 loan proximately caused Plaintiffs to select this loan from various competing offers, and
20 ultimately to go into default when Defendants repeatedly raised the interest rate on said loan.
21
22

23 95. Plaintiffs (1) read the TILA disclosure statement; (2) understood the interest
24 charges being disclosed as a fixed amount; (3) Had the disclosure statement been accurate, they
25 would have sought a lower price; and (4) they would have obtained a lower price for the
26 mortgage on their home.
27

98. The above mentioned acts of Defendants were willful and fraudulent. Plaintiffs have suffered as a result of the Defendants' fraudulent misrepresentation. Plaintiffs are, therefore, entitled to special damages for their suffering, and punitive damages to deter the Defendants' fraud, in an amount to be determined at trial.

COUNT XI (INJUNCTION/STAY)

99. The Plaintiffs repeat, reallege, and incorporate by reference the foregoing paragraphs.

100. The subject Property is Plaintiffs' residential homestead. Plaintiffs will be irreparably injured without adequate remedy at law if the currently threatened foreclosure is allowed to proceed, and Plaintiffs' property is taken from them. Plaintiffs ask that the Court restrain, and thereafter enjoin, any attempt to foreclose Plaintiffs' interest in the Property, or to

1 enforce any claim of right by any Defendant, or any third party, to possession of the Plaintiffs'
2 Property, pending resolution of this suit.

3 101. For the reasons in the foregoing paragraph, and allegations elsewhere in the
4 foregoing paragraphs, it is crucial to the preservation of Plaintiffs' rights and Property that any
5 action in any other proceeding in any other court be barred from being commenced, or stayed if
6 already commenced, until final resolution of the instant case.

7 102. Substantial recovery by Plaintiffs is probable, in view of the number and size of
8 the claims they make, the possibility of doubling or tripling of some damages, and their recovery
9 of fees and costs. The risk to Defendants associated with issuance of a temporary restraining
10 order is truly minimal, and issuance of such an order would be in the public interest, and
11 specifically in the interest of the integrity of the banking and home lending system that the
12 Congress has addressed in numerous statutes.

13 103. The undersigned represents to the Court that on the date of filing of this
14 Complaint, to the best knowledge of the undersigned, neither Defendants nor Defendants=
15 counsel are agreeable to the temporary or permanent injunctive relief sought.
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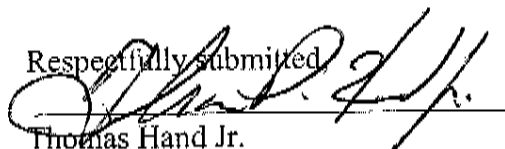
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18 **REQUEST FOR RELIEF**

19 **WTHEREFORE, Plaintiffs pray that this Court:**

- 20 1. Declare that the Defendants' actions violate the New Hampshire
21 foreclosure statute, RSA 479,
22
23 2. Declare that the Defendants' action violate the FDCPA
24
25 3. Declare that the Defendants' actions violate the New Hampshire Unfair,
26 Deceptive or Unreasonable Collection Practices Act, RSA 358C.
27
28 4. Declare the loan transaction rescinded, and order Defendants to release
their secured interest in the subject property.

- 1 5. Enter judgment in favor of Plaintiffs for statutory damages, costs, and
- 2 attorneys fees as provided by 15 U.S.C. §1692k (a)
- 3 6. Enjoin any foreclosure sale;
- 4 7. Award Plaintiffs compensatory damages in an amount to be determined at
- 5 trial;
- 6 8. Award Plaintiffs exemplary damages as allowed by law;
- 7 9. Award Plaintiffs their reasonable and necessary attorney's fees and costs;
- 8 10. Award Plaintiffs pre-judgment and post-judgment interest as allowed by
- 9 law;
- 10 11. Temporarily restrain, and permanently enjoin, any action to interfere with
- 11 Plaintiffs' exclusive ownership, use and possession of their residence
- 12 which was wrongfully threatened with foreclosure, pending resolution of
- 13 the instant case, and specifically to bar enforcement of any and all
- 14 foreclosure-related remedies, without limitation;
- 15 12. Grant Plaintiffs such other and further relief as this Court deems just and
- 16 proper.
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Respectfully submitted,

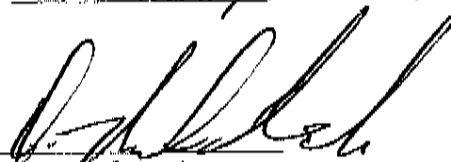


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VERIFICATION

I, the undersigned, certify and declare that I am a party to this action. I have read the foregoing complaint and know of its contents. The matters stated in the complaint described above are true of my knowledge except to those matters stated on information and belief, and as to those matters I believe them to be true. Each page of Exhibit A attached thereto is derived from my personal records, and is a true and correct copy of what it purports to be.

Executed on this 4th day of June, 2008 at CANTERBURY, New Hampshire.


Howard R Fogle, JR.